No. 79-180

In the Supreme Court of the United States

OCTOBER TERM 1979

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SUPREME COURT, U.S.

PATRICK T. SHEEDY, Personal Representative for the Estate of CECELIA BINN, Deceased,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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40

INDEX

	PAGE
Opinion	2
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	7
I. The Decision Below Conflicts With Precedents Set By The United States Supreme Court And United States Circuit Courts Of Appeals Concerning The Equitable Jurisdiction Of United States District Courts	7
II. A Statute Of Limitations Cannot Bar Recovery Before The Right To Recover Accrues And Therefore The Doctrine Of Equitable Tolling Is A Proper Remedy In Cases Involving Internal Revenue Taxation	13
Conclusion	22

Appendices:

A—Decision and Order, February 27, 1979 .....App. 1

B—Opinion of the Court of Appeals for the Seventh Circuit on May 21, 1979 .....App. 5

CITATIONS

Cases

PAGE

Bailey v. Glover, 21 Wall 342, (1875) 16, 17

Briley v. State of California, 564 F.2d 849, (9th Cir. 1977) 18, 19

Bryan v. United States, 99 F.2d 549, (10th Cir. 1938) .. 21, 22

Glus v. Brooklyn Eastern Terminal, 359 U.S. 392, (1958) 17

Hochfelder v. Ernst & Ernst, 503 F.2d 1100, (7th Cir. 1974) 17

Holmberg v. Armbrecht, 327 U.S. 392, (1945) 16

Kellog v. Citizens National Bank of Green Bay, 330 F.2d 635, (7th Cir. 1964) 14

Kendall v. United States, 107 U.S. 123, (1883) 19

Kreiger v. United States, 539 F.2d 317, (3rd Cir. 1976) 20, 21, 22

Lemon v. Kurtzmann, 411 U.S. 201, (1972) 17

Marbury v. Madison, 1 Cranch 137 (1803) 22

Miller v. United States, 500 F.2d 1007, (2nd Cir. 1974) .. 8

Mitchell v. DeMario, 361 U.S. 288, (1959) 7, 8, 12, 20

Neely v. United States, 554 F.2d 115, (3rd Cir. 1977) 21

Order of Railroad Telegraphers v. Railway Express, 321 U.S. 342, (1943) 16

Porter v. Warner, 328 U.S. 395, (1945) 7, 8, 12

PAGE

Public Service Co. of New Mexico v. General Electric Co., 315 F.2d 306, (10th Cir. 1963) 17

Reeves v. United States, 154 F.Supp. 673, (D. Pa. 1957) 15

Schuster v. C.I.R., 312 F.2d 311, (9th Cir. 1962) 9

Simmons v. United States, 308 F.2d 938, (5th Cir. 1962) 9

Soriano v. United States, 352 U.S. 270, (1957) 19, 20

Young v. United States, 203 F.2d 686, (8th Cir. 1953) .. 8, 10

Statutes

Internal Revenue Code of 1954, Sec. 6501(a) 3, 13, 18

Internal Revenue Code of 1954, Sec. 6511(a) 3, 13, 14, 15, 16, 18, 19

Internal Revenue Code of 1954, Sec. 7422(a) 3

26 U.S.C. 1340, (1940) 3, 8, 12

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VS.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Your petitioner, Patrick T. Sheedy, Personal Representative for the Estate of Cecelia Binn, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on May 21, 1979.

OPINION BELOW

The Opinion of the Court of Appeals for the Seventh Circuit is an unpublished order and appears in the Appendix hereto. The United States District Court for the Eastern District of Wisconsin rendered a decision on February 27, 1978 which as of yet has not been reported, said decision appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 21, 1979. Thereafter, a petition for rehearing en banc was timely filed on June 4, 1979 pursuant to Rule 40 of the Federal Appellate Rules of Procedure. Said petition was returned so that the plaintiff-appellant could comply with the local rules of procedure regarding pagination and the like. On June 11, 1979 the petition for rehearing was resubmitted in addition to a motion to file instanter. On June 20, 1979 the motion to file instanter was denied by Circuit Judge, William J. Bauer. This petition for certiorari was filed within 90 days of May 21, 1979. This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether United States District Courts have the equitable jurisdiction to invoke equitable remedies in cases involving Internal Revenue Taxation?

2. Whether the Internal Revenue statute of limitations can be equitably tolled or, conversely, whether said statute can bar recovery before the right to recover accrues?

STATUTORY PROVISIONS

Internal Revenue Code of 1954, Title 26 U.S.C. §1340:

> "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court."

§6501(a)

> "(a) GENERAL RULE—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period."

§6511(a)

> "PERIOD OF LIMITATION ON FILING CLAIM —Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid."

§7422(a)

> "(a) NO SUIT PRIOR TO FILING CLAIM FOR REFUND—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue

tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary according to the provisions of the law in that regard and the regulations of the Secretary established in pursuance thereof."

STATEMENT OF THE CASE

Cecelia Binn died on April 1st, 1967. Oscar Binn was appointed as personal representative for the Estate of Cecelia Binn later in that year and on November 19, 1969, he filed on the estate's behalf an Estate Tax Return Form 706. That return showed a tax due of Thirty-two Thousand Four Hundred Thirty and 05/100 Dollars ($32,430.05) and also served to commence the running of the statute of limitations. No monies were remitted with said Estate Tax Return.

Subsequently Oscar Binn was removed from his position as personal representative because of his refusal to properly administer and close the estate; he left absolutely no records whatsoever from which the successor personal representative could discern what his predecessor had accomplished.

On October 3, 1973, Attorney Patrick T. Sheedy, was appointed the successor personal representative by the Honorable Michael T. Sullivan, Chief Judge of Milwaukee County Circuit Courts. After his appointment Attorney Sheedy inquired whether or not an Estate Tax Return had ever been filed. The Internal Revenue Service responded, informing the plaintiff that no Estate Tax Return, Form 706 had ever been filed nor a closing letter issued and furthermore contended that the estate tax was due and owing.

Relying on this misrepresentation the estate on April 25, 1974, seventeen (17) months after the limitations period had expired, filed an estate return showing an amount assessed of Twenty-seven Thousand Seventeen and 50/100 Dollars ($27,017.50). Payment of the aforementioned sum accompanied the return and the Internal Revenue Service accepted same and further misled the plaintiff by assessing a penalty for the "late" filing of the return. It was not until May 30, 1977 over three (3) years hence that this penalty was abated.

On November 11, 1976, over two and one half (2½) years after the tax was paid, the Internal Revenue Service for the first time informed the plaintiff that a previous Estate Tax Return had been filed by Oscar Binn. In that letter, from the District Director L. M. Phillips, the Internal Revenue Service committed itself to the full refund of the monies which had been illegally assessed against, and paid by, the estate.

The estate then inquired of the Government when the refund would be forthcoming. After not receiving any response, the estate filed a claim for refund on November 30, 1976; this refund was later amended on May 31, 1977 by the terms of which the estate asked for the illegally assessed amount with interest Thirty-six Thousand Eight Hundred Five and 75/100 Dollars ($36,805.75).

On May 10, 1977, Patrick T. Sheedy received a letter from the District Director of the Internal Revenue Service which stated that the service had obtained legal advice from its Regional Counsel and that the Government had now decided it would not return the money illegally assessed. Because of the government's repudiation, the Estate of Cecelia Binn had no other recourse but to institute a suit for refund, which was filed on June 21, 1977 in the Federal District Court for the Eastern District of Wisconsin.

The action was filed by Patrick T. Sheedy, Personal Representative of the Estate of Cecelia Binn, against the United States of America for the recovery of Thirty-six Thousand Eight Hundred Five and 75/100 Dollars ($36,-805.75), illegally assessed by the Internal Revenue Service after the period of limitations had expired. The defendant, the United States, moved to dismiss the cause for lack of subject matter jurisdiction on the grounds that the plaintiff did not timely file a claim for refund with the Internal Revenue Service. The plaintiff, Patrick T. Sheedy, et al. subsequently moved for summary judgment on the grounds that the United States through material misrepresentations of fact and concealment thereof, prejudiced the plaintiff and consequently should be estopped from asserting the statute of limitations as a bar to the claim and that said statute should be equitably tolled. On February 27, 1978 the Honorable Myron L. Gordon, United States District Judge for the Eastern District of Wisconsin, without oral arguments denied the plaintiff's motion for summary judgment and, asserting that although the equities were in the plaintiff's favor the court could not grant equitable relief in tax cases, granted the defendant's motion to dismiss. Thereafter the Estate of Cecelia Binn, by Patrick T. Sheedy moved to vacate the court's final order and on May 16, 1978, fifteen days after the notice of appeal was filed, said motion was denied by a marginal order.

Thereafter the plaintiff filed an appeal with the United States Court of Appeals for the Seventh Circuit. The court heard the oral arguments on November 6, 1978 and on May 21, 1979 that court rendered its decision in favor of the United States of America. The Court of Appeals held, in short, that a failure to file a refund claim within the statutory period is ordinarily not subject to equitable consideration and in this case there was no reason to depart from well settled principles.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH PRECEDENTS SET BY THE UNITED STATES SUPREME COURT AND UNITED STATES CIRCUIT COURTS OF APPEALS CONCERNING THE EQUITABLE JURISDICTION OF THE UNITED STATES DISTRICT COURTS.

A.

In the United States Supreme Court cases of *Porter* v. *Warner,* 328 U.S. 395, (1945) and *Mitchell* v. *Demario,* 361 U.S. 288, (1959) this court expressly delineated the equitable jurisdiction of United States District Courts. In the *Mitchell* case, the court citing *Porter* v. *Warner,* stated that:

> *"Unless otherwise provided by statute all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction.* And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than only a private controversy is at stake. . . .
>
> (T)he court may go beyond the matters immediately underlying its equitable jurisdiction . . . and give whatever other relief may be necessary under the circumstances. . . . *Moreover the comprehensiveness of this equitable jurisdiction is not to be denied or limited in absence of a clear and valid legislative command.* Unless a statute in so many words or by a necessary and unescapable inference restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. The great principles of equity should not be yielded to light inferences or doubtful construction." (Emphasis supplied)

It is submitted that the United States District Courts have original jurisdiction of any civil action arising under any Act of Congress providing for Internal Revenue, to wit, Title 26 U.S.C. 1340. That grant of jurisdiction does not in any way, express or implied, deny the exercise of equitable relief in federal tax cases. Nevertheless, the United States Court of Appeals for the Seventh Circuit has effectively overruled the *Mitchell* and *Porter* cases, by its affirmance of the lower court, which ruled that, ". . . general principles of equity may not be applied in tax cases. . . ." (Appendix p. 4)

The lower court's decision not only conflicts with precedents of the United States Supreme Court, but it also aggravates a continuing schism between the various circuits on the propriety of exercising equitable relief in tax cases. At the present, the Seventh and Eighth Circuits follow the case of *Young* v. *United States,* 203 F.2d 686, (8th Cir. 1953) and deny any equitable relief whatsoever. Whereas the Second, Fifth and Ninth Circuits all utilize equity in the resolution of matters involving Internal Revenue taxation.

In *Miller* v. *United States,* 500 F.2d 1007, (2nd Cir. 1974) an action for refund of income taxes was dismissed by the lower court on the grounds that the statute of limitations had expired. The Court of Appeals reversed, holding that since the I.R.S. had misled the taxpayer it was estopped from asserting the statute of limitations.

> "In sum given that the relevant statute of limitations is by its very terms rather flexible, that there is no collusion with the taxpayer to defraud the federal fisc and that the taxpayer's reliance on the erroneously issued disallowance notice was not unreasonable, we concluded that the government is estopped from raising the earlier deadline as a bar to this action."

The case of *Simmons* v. *United States,* 308 F.2d 938, (5th Cir. 1962) held that equitable estoppel is the suitable remedy in tax cases:

> "It is well settled that the doctrine of equitable estoppel, in proper circumstances and with appropriate caution may be invoked against the United States in cases involving Internal Revenue Taxation."

Despite the fact that the occasions arise infrequently, the I.R.S. should be barred from raising the defense of the statute of limitations when by its words, action or even silence, it intentionally or carelessly induces another to do an act which he would not otherwise have done and which will prove injurious to him if he is not allowed to insist that the I.R.S. not contradict the previous position it has taken.

The Ninth Circuit in the case of *Schuster* v. *C.I.R.,* 312 F.2d 311, (9th Cir. 1962) affirmatively approved of the equitable application of estoppel stating that:

> "We recognize the force of the proposition that estoppel should be applied against the government with utmost caution and restraint for it is not a happy occasion when the government's hands performing duties in behalf of the public are tied by the acts and conduct of particular officials in their relations with particular individuals. Estoppel has been applied against the Commissioner (I.R.S.) in limited situations . . . . Indeed the tendency against government estoppel is particularly strong where the official conduct involves questions of essentially legislative significance as where he conveys a false impression of the laws. Obviously Congress' legislative authority should not be readily subordinated to the action of a wayward or unknowledgeable administrative official . . . . But we regard this proposition as one of general application . . . . It is conceivable that a person might sustain such a profound and unconscionable injury in

reliance on the Commissioner's action as to require, in accordance with any sense of justice and fairplay that the commissioner not be allowed to inflict the injury . . . . But as long as the concept of estoppel retains any validity it is conceivable that such situations might arise . . . . Therefore we conclude the Commissioner is estopped . . . ."

B.

It is submitted that the court below has created an anomaly by its affirmance of the lower court's decision of May 21, 1979. The Estate must point out that upon appeal it raised the strictly legal issue of whether the trial court committed error in finding as it did, that as a matter of law there are no equitable remedies available in the area of Internal Revenue taxation. This was necessitated by the district court ruling which cited obiter dicta from the case of *Young* v. *United States,* 203 F.2d 686, (8th Cir. 1953) wherein the court stated:

> "For as it has so frequently been said, general principals of equity may not be applied in tax cases but claims must be brought within the scope of statutory authority for their allowance." (App. p. 4)

The district court, based upon this proposition, granted the defendant's motion to dismiss, notwithstanding the court's determination, that all of the equities weighed heavily in the Estate's favor:

> "As previously noted, there are numerous impressive equitable aspects to the plaintiff's claim. . . ." (App. p. 4)

Upon appeal the court ruled that in extraordinary instances equity was available to the litigant:

> "The courts have therefore held that failure to file a claim for refund within the limitations period is a jurisdictional prerequisite and that the failure to file within that period is *ordinarily* not subject to equitable consideration." (App. p. 7) (Emphasis supplied)

The United States Circuit Court of Appeals held that statutes of limitation must be construed strictly but cautioned that there were in fact extraordinary situations wherein equity would be available. Having determined the law the appeals court finally stated that:

> "In this case we find no reason to depart from these well settled principles." (App. p. 7)

In this connection the non sequitur of the Seventh Circuit's reasoning should be apparent when justapositioned with the decision of the United States District Court, to wit:

A. The District Court held that:

1. ". . . general principles of equity *may not* be applied in tax cases. . . ." (App. p. 4) and
2. ". . . there are numerous impressive equitable aspects to the plaintiff's claim." (App. p. 4)

The Estate then raised the issue of the availability of equity on appeal and:

B. The United States Circuit Court of Appeals held that:

1. ". . . the failure to file within that period is *ordinarily not subject to equitable considerations.*" (App. p. 7) and
2. "In this case we find no reason to depart from these well settled principles." (App. p. 7)

It should be readily apparent that the Appeals Court and the District Court have reached opposite conclusions

on both hypotheses, nevertheless the Appellate Court affirmed the decision! The District Court found that the Estate had "numerous impressive equitable aspects" to its claim presumably due to the fact that the Internal Revenue Service fraudulently misrepresented material facts to the estate, which in turn relied on such and paid a tax that was illegally assessed. Nevertheless the Seventh Circuit sat as a fact finder and improperly weighing the facts and held this is not a proper case for an application of equity.

It is respectfully submitted that since the United States Circuit Court of Appeals has ruled that equity is available in extraordinary circumstances the proper resolution of the case would have been a remand to the District Court to determine as fact finder whether or not equity is appropriate in this instance and then allow it to rule accordingly.

It is submitted that United States District Courts have been granted jurisdiction pursuant to Title 26 U.S.C. §1340, to decide cases involving Internal Revenue, and that grant of jurisdiction in no way is limited to the mere exercise of law. Under the doctrine of stare decisis, the Courts of Appeal are bound to apply the precedential cases of *Mitchell* v. *Demario,* supra, and *Porter* v. *Warner,* supra, which specifically state that District Courts have inherent equitable powers to exercise that jurisdiction unless specifically denied by statute. The Seventh and Eighth Circuits refuse to follow these Supreme Court precedents and therefore a conflict now exists between the various circuits.

These conflicts justify the grant of certiorari to review the judgment below.

II.

A STATUTE OF LIMITATIONS CANNOT BAR RECOVERY BEFORE THE RIGHT TO RECOVERY ACCRUES AND THEREFORE THE DOCTRINE OF EQUITABLE TOLLING IS A PROPER REMEDY IN CASES INVOLVING INTERNAL REVENUE TAXATION.

Under the Internal Revenue Code, §6511(a) the statute of limitations for the filing of a claim for refund is bifurcated into two different periods: There is a three (3) year period which runs from the time the return was filed or a two (2) year period from the time the tax was paid. In the present case the original tax return, from which the applicable date for computing the commencement of the statute of limitations is determined, was filed on November 19, 1969. Concomitantly with that date in mind then the three (3) year period of limitations (§6511(a)) and the three (3) year period of assessment found in Internal Revenue Code of 1954, §6501(a) both expired on November 19, 1972.

Due to fraudulent misrepresentation of the I.R.S., the tax was paid on April 25, 1974 and thereafter the two (2) year period of limitations running from the date of payment expired on April 25, 1976. It was not until November 11, 1976 that the estate was informed of the illegal assessment and concealment thereof.

Considering the date of the illegal assessment, the date of payment and the date that the estate was informed of true facts, it should be readily apparent that the estate never had requisite knowledge, nor the opportunity to timely file a claim for refund under either of the two periods found in §6511(a). As to the three (3) year period, it had already expired well over seventeen (17) months before the I.R.S. made its misrepresentations and

collected the "overpayment." It is a matter of common sense that in order for the estate to timely file a refund claim within three (3) years, the successor personal representative would have had to, after making and learning of the overpayment, then be able to somehow, proceed back through time and file the claim. This result is as absurd as is the means that the estate would have had to employ in order that it meet the two (2) year period of §6511(a).

Oscar Binn was removed from his position as personal representative because of non-feasance in office, and amongst other things, he kept no records. Either because of his inability to remember or his animosity stemming from his removal, could not or would not supply the necessary information. As a direct result of such, the successor personal representative had no recourse but to ask the I.R.S. whether a return had been tendered. On the basis of false information provided by the agency, the illegally assessed monies were paid. Thus in order for the estate to then have timely filed as to the two (2) year period, the estate first would have had to have reason to disbelieve the I.R.S. and secondly verify that a previous return had in fact been filed, by gaining access to confidential I.R.S. files—which would be an impossible and/or illegal scenario.

One of the issues raised on appeal, was expressed but not resolved in *Kellog* v. *Citizens National Bank of Green Bay*, 330 F.2d 635 (7th Cir. 1964).

> "At least where as here, a substantial part of the usual limitations period remains when the taxpayer learns of the events causing or likely to cause a diminution in his liability, he should file a protective refund claim in order to preserve his position. If he fails to do so he will allow the limitation bar to fall. In a case like this there is no sufficient reason to think that Congress intended anything more than the normal period.

> We do not have in this instance a controversy in which the events invoked by the taxpayer for his refund claim first occurred after the general limitation period had expired. Such a case raises an additional problem—whether there can be a case in which the statute of limitations bars recovery before the right to recover accrues—which we leave undecided for the present."

If the present decision herein is affirmed and the limitations period of §6511(a) is strictly construed then considering the patent misrepresentation and concealment thereof, then there does exist a case in which the statute of limitations bars recovery before the right accrues—or in other words, a wrong without a remedy.

In the case of *Reeves* v. *United States,* 154 F.Supp. 673, (D. Pa. 1957) that court held that the statute of limitations could not commence to run until the cause of action had come into existence.

> "The inequity and palpable injustice which would arise if a taxpayer would be barred from recouping overpayment of inheritance tax or estate tax resulting from a deficiency assessment on a decedent's income tax after the statute of limitations has purportedly run for the recoupment of overpayment of inheritance tax is obvious and not to be disputed.
>
> Revenue Service should not be permitted to impose a deficiency assessment on one hand and by reason of the belatedness of such assessment on the other hand deprive a taxpayer of a right of recoupment to which said deficiency assessment give rise."

The aforementioned cases stand for the proposition that the limitations period runs only from the time of the later operative event so as to prevent what is considered an unjust result. It is only logical that where later events have created an illegal payment of taxes, that the limitation

period should be adjudged to run from the time of the later event. As the Supreme Court stated in *Order of Railroad Telegraphers* v. *Railway Express,* 321 U.S. 342, (1943), statutory limitation periods are:

> ". . . designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories faded and witnesses disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of state claims in time comes to prevail over the right to prosecute them."

Overpayment in the present situation is due to a misrepresentation made after the first limitation period had expired and the concealment of the true facts prevented a timely claim from being filed in the later (2) two-year period of §6511(a). This is not a situation wherein there is a patently stale claim. The I.R.S. is not using the limitation period as a shield against a stale claim but rather as a sword to collect funds that were uncollectible due to its own misfeasance.

In situations as the present the applicable law, which the United States Court of Appeals for the Seventh Circuit refused to follow, is found in the United States Supreme Court cases of *Holmberg* v. *Armbrecht,* 327 U.S. 392, (1945) and *Bailey* v. *Glover,* 21 Wall 342, (1875). In the *Holmberg* case the court specifically commanded that:

> "And so this court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there is no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." *Bailey* v. *Glover,* 21 Wall 342, 348; and see *Exploration Co.* v. *United States,* 247 U.S. 435; *Sherwood* v. *Sutten,* 5 Mason 143.
>
> "This equitable doctrine is read into *every* federal statute of limitation." See; *Glus* v. *Brooklyn Eastern Terminal,* 359 U.S. 392, (1958); also see *Lemon* v. *Kurtzman,* 411 U.S. 201, (1972). (Emphasis supplied)

In this regard now that the Seventh Circuit has rejected equitable tolling in some statutes of limitations, there is now a conflict between Circuits. In the case of *Public Service Co. of New Mexico* v. *General Electric Co.,* 315 F. 2d 306, (10th Cir. 1963), the 10th Circuit has held that:

> "We agree with the statement of the Second Circuit that; As we read the Supreme Court's opinion in *Holmberg* v. *Armbrecht,* supra., that it is applicable unless Congress *expressly* provides to the contrary in clear and unambiguous language.
>
> "If the Supreme Court is disposed to change the *Holmberg* Rule it can do so. If Congress is disposed to forbid tolling by fraudulent concealment it can do so. We are controlled by the decisions and statutes before us."

Although the principle might have been limited to cases where the action itself sounded in fraud, it has not been so confined; in *Hochfelder* v. *Ernst & Ernst,* 503 F.2d 1100, (7th Cir. 1974) the court held:

> ". . . that where a fraud which is the foundation of the suit has actively been concealed or is of such a nature as to conceal itself, the statute of limitation is tolled until the plaintiff has obtained knowledge of the fraud."

This extension of the tolling doctrine to concealment is echoed in *Briley* v. *State of California,* 564 F.2d 849 (9th Cir. 1977):

> ". . . the established rule which we apply in this case, is that where a plaintiff has been injured by fraud or *concealment* and remains in ignorance of it without any fault or want of diligence on his part, the statutory period does not begin until discovery of the injury." (Emphasis supplied)

As applied to this appeal, the district court below ruled that the "return" as used in §6511(a) refers to ". . . the initial return and not either a second return or to an amended return." Holding that since the action taken by the estate was not encompassed under the word "return" in §6511(a), the estate could not fall within the statutory period for allowance of refund claims and dismissed the cause on the grounds that the court would be exceeding its jurisdiction if it granted relief under those circumstances.

The error in this analysis is that the I.R.S. itself was without any jurisdiction whatever to make the assessment when it did so. The Internal Revenue Code of 1954, §6501(a) provides ". . . the amount of any tax imposed by this title shall be assessed within three (3) years after the return was filed."

Furthermore, not only was said assessment illegal but that the facts necessary for the estate to recognize such acts as illegal, were concealed by the I.R.S. for well over two and one half (2½) years after the filing date.

The estate has not contended that the word "return" in §6511(a), applies to the return of April 25, 1974. Rather it was and is the position of the estate that since the government concealed or fraudulently concealed the facts

necessary for the estate to timely file, the right to recover the refund did not accrue until the ". . . discovery of the injury." *Briley* v. *State of California,* 564 F.2d 849, (9th Cir. 1977). The two (2) year period of §6511(a), runs from the date of payment, the date of payment is the date that the estate was injured, therefore the statute of limitations should be tolled on the date of injury (April 25, 1974) and remain tolled until the I.R.S. letter of November 11, 1976, which disclosed the illegality of the assessment.

The United States Appeal Court for the Seventh Circuit disregarded the Supreme Court cases and held that statutes of limitation applicable to suits against the government must be strictly construed and hence cannot be equitably tolled. The obvious error in that analysis is that the *Holmberg* case specifically states that the doctrine is applicable to "every federal statute of limitations." Furthermore it must be pointed out that the Court's reliance upon certain cases in reaching its decision is misplaced because said cases can be readily distinguished from the case at bar.

The case of *Soriano* v. *United States,* 352 U.S. 270, (1957) is cited for the proposition that statutes of limitation must be strictly construed.

The obvious distinctive feature found in the *Soriano* case is that the Supreme Court granted "certiorari" from the Court of Claims which is created under Article I of the United States Constitution. As an Article I Court, its jurisdiction is completely limited to certain enumerated claims:

> "It has been settled since *Kendall* v. *United States,* 107 U.S. 123, (1883) that Congress in creating the Court of Claims gave the Governments consent to be sued therein only in certain classes of claims and that

no others might be asserted against it, including claims which are declared barred if not asserted within the time limited by statute."

Furthermore the court refused to apply the doctrine of equitable tolling on the grounds that the plaintiff asked that it be tolled due to war which was contrary to the express intent of Congress, as opposed to the case at bar, in which the basis for tolling would be the intentional malfeasance of the Internal Revenue Service by fraudulent misrepresentation and concealment thereof.

> "With this intent in mind, Congress has passed specific legislation each time it has seen fit to toll such statutes of limitation because of war." *Soriano* v. *United States,* 352 U.S. 270, (1957).

Clearly in determining the equitable jurisdiction of the District Courts (which were created under Article III of the Constitution) a reference to a jurisdictional statement concerning the Court of Claims is totally irrelevant and inapplicable. The Estate must point out the controlling case of *Mitchell* v. *Demario,* 361 U.S. 288, (1959) (decided two years after the *Soriano* decision) which the court overlooked and failed to apply. In *Mitchell* the Supreme Court stated specifically when a District Court has the jurisdiction to grant equitable relief.

The court below also cited the Third Circuit case of *Kreiger* v. *United States,* 539 F.2d 317, (3rd Cir. 1976) as the controlling law in this area. In that case third parties were responsible for the active concealment of information necessary for a filing of a refund claim. The court therein refused to hold the government responsible for the acts of the third parties:

> "Even if we were to conclude that there might be circumstances compelling enough to justify tolling for fraudulent concealment in a suit against the government *such circumstances are not present here. The fraudulent concealment of which these plaintiffs complain is that of a stranger to the cause of action and can in no way be attributed to the defendant.* The circumstance takes the present case beyond both the established scope and the rationale of the *Holmberg* Doctrine. Plaintiffs have cited no cases applying the tolling doctrine where the fraudulent concealment was that of a third party." (Emphasis supplied)

It should be clear that in the present case the concealment was by a "party" to the action not by some extraneous stranger who had no relation to the controversy. The *Kreiger* case merely stands for the proposition that when third party concealment is involved, the circumstances are insufficient to charge a party to the action with equitable tolling:

> "Kreiger was simply a tax refund case, not involving constitutional issues where this court refused to toll the tax refund statute of limitations, 26 U.S.C. 6511(a) *on a theory of fraudulent concealment by a third party." Neely* v. *United States,* 554 F.2d 115, (3rd Cir., 1977) (Emphasis supplied)

The other cited case was that of *Bryan* v. *United States,* 99 F.2d 549, (10 Cir. 1938), wherein the reviewing Court did not hold that equitable tolling is unavailable in tax cases but rather stated that under the facts therein the remedy would be inappropriate. The remedy was denied the taxpayer on the grounds that the government agents had exceeded the scope of their authority and since they were acting outside of their employment the government could not be held responsible:

> "It was not part of the duties of the agents and representative to conceal incorrect income tax returns and excessive payments of income taxes. In so doing they clearly acted without and beyond the scope of their authority. . . *the fraudulent concealment must have been that of the party sought to be charged. . . .*"

Thus the law in this area is patently clear, equitable tolling is permissible in certain situations and under the proper circumstances. In *Bryan* the remedy was denied due to a finding of fact that the agents acted in excess of their authority, concomitantly in *Kreiger* the remedy was unavailable because third party action concealed the fraud, which could not be in turn attributed to the U S. Government. The bottom line is that before a court can grant the remedy of equitable tolling it must be assured that a party to the action was culpable in concealing the fraud.

It is submitted that there is considerable disagreement on the subject of equitable tolling between the various Circuits, and this court should grant certiorari to decide the important federal question of whether equitable tolling is available in tax litigation and in what circumstances.

CONCLUSION

> "The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. . . . It behooves us then to enquire whether there be in its composition any ingredient which shall exempt it from legal investigation or exclude the injured party from legal redress . . . ." *Marbury* v. *Madison*, 1 Cranch 137, (1803).

For these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

PATRICK T. SHEEDY, Personal Representative of the ESTATE OF CECELIA BINN, Deceased,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

DECISION AND ORDER

The plaintiff has moved for summary judgment, and the defendant has moved to dismiss for lack of jurisdiction over the subject matter. The complaint in this action seeks a refund of $36,805.75, which sum the plaintiff contends was illegally assessed by the internal revenue service after the period of limitations had expired.

The plaintiff contends that the original personal representative of the estate of Cecelia Binn was removed because of his failure properly to administer the estate. Cecelia Binn died on April 1, 1967, and the plaintiff, Mr. Sheedy, was appointed as successor personal representative on October 3, 1973.

After his appointment, he inquired of the government "whether an Estate Tax Return had ever been filed." He was told that there had been no filing and that a tax was due. Thereupon, the successor personal representative filed an estate tax return and paid the tax. Over two years later, the internal revenue service, in a letter dated November 11, 1976, informed Mr. Sheedy that an estate

tax return had in fact been filed by the original personal representative on November 19, 1969, but that no payment of the tax had been made at that time. The letter of November 11, 1976, went on to state:

> "It appears that the statutory period in which we could legally have assessed and collected any estate tax has expired.
>
> "No party of the payment made by you will be assessed or retained without correspondence from you stating that your payment after expiration of the statutory period is voluntary."

Subsequently, the defendant withdrew its suggestion that a refund would be made, and now the government vigorously resists the plaintiff's claim for a refund. The government's present position is that the plaintiff is barred by statute from pursuing this claim for a refund because more than three years have expired since the estate tax return was filed and more than two years have expired from the time the tax was paid.

The equities in this matter weigh heavily on the side of the plaintiff. The defendant does not deny that when Mr. Sheedy became the successor representative, he inquired whether a return had been filed and was advised by the government that no such filing had been made. In obvious reliance on such representation and in furtherance of what the successor representative quite properly assumed to be his legal responsibility, he prepared and filed an estate tax return and caused the tax to be paid. Within a few days thereafter, the government assessed a late filing penalty, although it was subsequently abated.

The plaintiff was not apprised of the fact that a previous return had been filed by the original representative until November 11, 1976. It is thus apparent that the successor representative filed a federal estate tax return upon the

mistaken assumption that none had been previously filed and that he paid a federal estate tax at a time when the government would not have been able to assess such obligation upon the estate of Cecelia Binn. It is also apparent that the filing of the second federal estate tax return and the payment of the tax were both made by the successor personal representative upon the basis of misinformation provided by the defendant after October 3, 1973.

Notwithstanding all of the foregoing equitable aspects in support of the plaintiff's claim, the government contends that it was Mr. Sheedy's obligation to ascertain whether an original return had been filed by his predecessor. The government also argues that no double tax is involved—that the estate has made but one payment, with no penalty. In other words, the internal revenue service argues that the estate of Cecelia Binn "has been deprived of a windfall" but has made only one payment of its tax.

The principal thrust behind the government's motion to dismiss is that notwithstanding the matter of equities, the plaintiff's alleged right to sue for a refund is precluded by statute. 26 U.S.C. § 6511(a) provides that a claim for refund of an overpayment

> ". . . in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, . . ."

Under this statute, the only way that the plaintiff could qualify as having made a timely claim for refund would be to treat the word "return" as applying to the second return filed in April, 1974. However, the government urges that it is the first return, filed in November, 1969, which "triggered all relevant statutes of limitations." The second filed return must be treated as an "amended" return under the government's analysis.

The words "the return" are used in the singular, and I believe that such words in § 6511(a) refer to the initial return and not to either a second return or to an amended return. In spite of the equities previously noted in support of the plaintiff's position, there is applicable here the comment of the court of appeals for the eighth circuit in Young v. United States, 203 F.2d 686, 689 (8th Cir. 1953), where the court noted that if taxpayers

> ". . . do not bring their claim within the orbit of some congressional authorization for its allowance, the courts are powerless to grant them relief. For as it has so frequently been said, general principles of equity may not be applied in tax cases, but claims must be brought within the scope of statutory authority for their allowance."

As previously noted, there are numerous impressive equitable aspects to the plaintiff's claim. The statutory provisions regarding taxes are not, however, always based on an individual's sense of fairness or even on fair play. Under all the circumstances, I find that the court is without authority to entertain the plaintiff's application, and therefore the defendant's motion to dismiss must be granted.

Therefore, IT IS ORDERED that the plaintiff's motion for summary judgment be and hereby is denied.

IT IS ALSO ORDERED that the defendant's motion to dismiss be and hereby is granted.

IT IS FURTHER ORDERED that the plaintiff's action be and hereby is dismissed.

Dated at Milwaukee, Wisconsin, this 27 day of February, 1978.

MYRON L. GORDON

U. S. District Judge

APPENDIX B

For the Seventh Circuit
Chicago, Illinois 60604

May 21, 1979

(ARGUED NOVEMBER 6, 1978)

Before

Hon. Thomas E. Fairchild, Chief Judge

Hon. Philip W. Tone, Circuit Judge

Hon. William J. Bauer, Circuit Judge

PATRICK T. SHEEDY, Personal Representative for the Estate of CECELIA BINN, Deceased,

Plaintiff-Appellant,

No. 78-1615 vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.—No. 77 C 382
Myron L. Gordon, Judge.

ORDER

Patrick T. Sheedy, as successor personal representative for the estate of Cecelia Binn, instituted a suit in the district court seeking a refund of the estate tax and interest paid on behalf of the estate. The district court granted the government's motion to dismiss, holding that it lacked subject matter jurisdiction because the estate's claim for

refund had not been timely filed pursuant to Section 6511 (a) of the Internal Revenue Code. Sheedy now appeals. For the reasons noted below, we affirm.

Section 7422(a) of the Internal Revenue Code of 1954 provides:

> "(a) *No suit prior to filing claim for refund.*— No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secreatry (sic) or his delegate established in pursuance thereof." 26 U.S.C. § 7422(a)

Section 6511(a) of the Code provides:

> "Period of limitation on filing claim—Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later. . . ." 26 U.S.C. §6511(a).

In this case, it is undisputed that the successor personal representative of the estate paid the estate tax no later than July 30, 1974, and filed a claim for refund no earlier than November 30, 1976. Accordingly, since more than two years elapsed between the paying of the tax and the filing of a claim for refund, the claim is time barred.

In this connection, we are not persuaded by the appellant's argument that (1) the statute is subject to equitable tolling or (2) the government is subject to equitable estoppel. It is well established that the statutes of limitation applicable to suits against the government are conditions attached to the sovereign's consent to be sued and must be strictly construed. *Soriano* v. *United States,* 352 U.S. 270, 276 (1957). Accordingly, "unlike general statutes of limitation which govern independently existing causes of action between private parties, the timeliness requirement [of § 7422(a)] is not procedural or remedial, but jurisdictional." *Kreiger* v. *United States,* 539 F.2d 317, 321 (3rd Cir. 1976). The courts have therefore held that the failure to file a claim for refund within the limitations period is a jurisdictional prerequisite and that the failure to file within that period is ordinarily not subject to equitable considerations. *See e.g., Bryan* v. *United States,* 99 F.2d 549 (10th Cir. 1938), *cert. denied,* 305 U.S. 661 (1939); *Kreiger* v. *United States, supra.*

In this case, we find no reason to depart from these well settled principles. Accordingly, the judgment of the district court is

AFFIRMED.